AUG 10 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 273

INTERNATIONAL ALUMINUM WINDOW CORPORATION, a Florida Corporation; AERO-VENT ALUMINUM WINDOW CORPORATION, a New York Corporation; and CHARLES I. GIRSCHOWITCH,

Petitioners,

—against—

TITO A. FERRI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM G. WALL,
Attorney for Petitioners,
15 Whitehall Street,
New York, New York.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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IN THE

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INTERNATIONAL ALUMINUM WINDOW CORPORATION, a Florida Corporation; AERO-VENT ALUMINUM WINDOW CORPORATION, a New York Corporation; and CHARLES I. GIRSCHOWITCH,

Petitioners,

—against—

TITO A. FERRI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable Chief Justice and the Assistant Justices of the Supreme Court of the United States:

Your Petitioners pray that a writ of certiorari be issued to review the final order and decree of the Supreme Court of the State of Florida rendered on April 14, 1954, which affirmed a decree of the Circuit Court of Dade County, State of Florida entered on the 13th day of March, 1953 confirming a report and recommendations of the Special Master appointed by said Circuit Court, filed and entered on the 28th day of January, 1953.

Opinions of the State Court

The Special Master filed his Special Report (Appendix A) on January 28, 1953 recommending that the agreements dated May 18, 1946, June 26, 1946 and June 17, 1949 (Transcript, pp. 7-19) be declared null and void because of failure of consideration. He also recommended that Ferri be declared the sole and exclusive owner of Patent #2,551,590. On March 13, 1953 the Circuit Court, Dade County, entered a final decree (Appendix B) affirming the report of the Special Master in all respects. On April 13, 1954 the Supreme Court of Florida filed a decision (Appendix C) affirming the decree of the Circuit Court (reported in Southern Reporter Advance Sheets May 27, 1954 (Fla.), 72 So. 2d 31).

On July 9, 1954 an order of the Supreme Court of the United States was made and entered granting an extension of time to the Petitioners in which to file the within Petition for a Writ of Certiorari until August 11, 1954.

Jurisdiction

The jurisdiction of this Court is invoked under the Judicial Code, Title 28 U. S. C. A., Section 1257, subdivision (3) and Rule XIX, sub-division (b) of the Rules of this Court; also under Article XIV, Section I (Amendment to the Constitution of the United States) and under the Declaration of Rights, Section 12 of the Constitution of the State of Florida.

Questions Presented

The questions presented are:

1. Whether the Supreme Court of Florida can legally annul three certain contracts because of the alleged failure of consideration (failure of Girschowitch to get into production) without adjudging that the Petitioners first be placed *in statu quo.*

2. Whether the said decree of the Supreme Court of the State of Florida deprived the Petitioners of their property without due process of law.

Constitutional Provisions Which the Case Involves

Section I of the 14th Amendment to the Constitution of the United States provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

Statement of Facts

This case involves a suit in the State of Florida by Ferri for the rescission of three contracts (Transcript, pp. 7-19). In the first contract Ferri agreed to and later did assign to Girschowitch a one-half (½) interest in his certain patent application (filed June 5, 1946 but patent was not issued until May 8, 1951) in consideration of the promise of Girschowitch to produce the necessary financing and place the invention (an improvement on a louvre type window) in production. Thereafter, these two parties formed the

International Aluminum Window Corporation, in which each held 255 shares of stock and which they both controlled jointly, to which corporation they both gave a license to manufacture and market the window in question. Later International gave a sub-license to Aero-Vent to manufacture and sell the subject of this invention.

Ferri sued the Petitioners in the Circuit Court of Florida for rescission of these three contracts on the grounds of: (1) alleged fraud and misrepresentation on the part of Girschowitch and (2) failure of consideration on the part of the Petitioners.

The Circuit Court Judge referred the matter to a Special Master who in his special report ruled out any fraud and misrepresentation on the part of the Petitioners but recommended that these agreements be declared null and void because of the failure of consideration, namely, that the Petitioners failed to put the window into production (there is no time limit in the agreements for getting into production).

The Supreme Court found however, that Girschowitch had made a substantial effort to comply with the terms of the contracts. Nevertheless, the Court failed to hold that the Petitioners, and more particularly Girschowitch, should be placed *in statu quo,* said Girschowitch having personally expended from his own pocket sums far in excess of $50,000 during almost a six (6) year period during which he received no salary or income in a vain effort to perfect a model of the invention, manufacture and market it (Transcript, pp. 170, 174, 185, 188-189, 191-192, 197-198, 201-202, 205-207, 235-237). These sums were paid out by him also for promotional and legal fees, patent interference suits, machinery, rent, travel (and exten-

sive world-wide advertising in connection with the invention).

It is the contention of the Petitioners that Ferri was dilatory and most un-cooperative; that it took him two (2) years to supply the drawings of the model and that these were so imperfect that the extrusions made therefrom were useless and that Girschowitch incurred great expenses in having this job re-engineered; further, that during the period 1946-1951 there was a shortage of strategic materials which included aluminum and that the Court should have taken judicial notice of this fact.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts

Objections were raised in the exceptions to the Special Master's report (Transcript, pp. 252-253) and in the Assignment of Errors to the Supreme Court (pp. 257-258).

The substantive issues on which the Petitioners based their claim for relief were preserved by the foregoing.

The federal question herein raised is whether in acting on the said substantive issues the Florida Supreme Court denied Petitioners due process of law in so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. From the very nature of this question, it did not arise until subsequent to the action of the Florida Supreme Court, but was inherent in its decision. Similarly, the issue was likewise inherent when the case was before the Special Master (*Saunders* v. *Shaw, et al.*, 244 U. S. 317, 320).

Reasons for Granting Writ

1. The decision of the lower court is contradictory to the decision of this Court in *Grymes* v. *Sanders, et al.*, 93 U. S. 55, and decisions of the United States Courts of Appeals.

Before rescission can be granted the parties must be placed *in statu quo* (*Grymes* v. *Sanders, et al.*, 93 U. S. 55, 62; *Sylvania Industrial Corp.* v. *Lillienfeld's Estate, et al.* (C. C. A., 4 Cir.), 132 Fed. 2d 887, 893; *Singer, et al.* v. *Friedman* (C. C. A., D. C.), 85 Fed. 2d 690, 692 (cert. denied 299 U. S. 590); *Daniel, et al.* v. *Elks Refining Co.*, 103 F. Supp. 898, 902, affd. (C. C. A., 4th Cir.), 199 F. 2d 479; *United States* v. *Haynes School Dist.*, 102 F. Supp. 843, 853; *Columbus Hotel Management Corp.* v. *Hotel Management Co.*, 116 Fla. 464, 477, 478; 12 Am. Jur., Sections 451, 452; 17 C. J. S., Sections 438, 439; Black on Rescission and Cancellation (2d Ed.), pp. 3-4).

Here there was absolutely no finding of fraud or misrepresentations on the part of the Petitioners, the lower court rescinding the contracts solely on the ground of failure of consideration.

As the United States Court of Appeals said in *Sylvania Industrial Corp.* v. *Lillienfeld's Estate, et al.*, 132 Fed. 2nd 887 at pages 892, 893 in discussing 12 Am. Jur. 1038:

> "To rescind a contract is not merely to terminate it * * *. Generally speaking, the effect of rescission is to extinguish the contract. * * * The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract."

In *United States* v. *Haynes School Dist.*, 102 F. Supp. 843, the Court stated at page 853:

> "The idea of rescission implies the re-establishment of the *status quo* prevailing before the contract was made, and ordinarily the party seeking rescission cannot retain the benefits which he has received from the other party's performance (citing cases)."

Likewise, this United States Supreme Court stated in *Grymes* v. *Sanders, et al., supra,* at page 62:

> "Where a party decides to rescind upon the ground of mistake or fraud he must on discovery of the facts at once announce his purpose and then adhere to it. If he be silent and continues to treat the property as his own, he will be held to have waived the objection * * * Delay and vacillation are fatal to the right which had before subsisted."

It follows that since Ferri delayed almost for six years before asserting his rights and claims for equitable relief it is most inequitable that he should now be allowed to reap full benefits of the vast financial expenditures and investments by Girschowitch.

2. In granting rescission without compensating the Petitioners and permitting Ferri to retain the benefits under the contracts, the decision of the lower court permits persons to be deprived of their property without due process of law, which is contrary to the 14th Amendment to the Constitution of the United States.

That the decisions and judicial actions of State Courts constitute such State action as to come within

the scope of the 14th Amendment is well established (*Shelley* v. *Kraemer, et ux.*, 334 U. S. 1, 14-16; *American Federation of Labor, et al.* v. *Swing, et al.*, 312 U. S. 321; *Commissioners* v. *City of Philadelphia*, 324 Pa. 129, 188 Atl. 314).

Contractual rights are vested rights within the meaning of the term "property" as used in the 14th Amendment and an attempt to impair same, either legislatively or judicially, must fail for want of due process (*Ettor* v. *City of Tacoma*, 228 U. S. 148, 156; *Coombes* v. *Getz*, 285 U. S. 434, 442; *Deutsche Bank und Diskontogesellschaft* v. *Cummings*, 83 Fed. 2nd 554, 559, Reversed on other grounds 300 U. S. 115).

Also in *Commissioners* v. *City of Philadelphia*, 342 Pa. 129, 188 Atl. 314, the court stated at page 134, and 188 Atl. 314, at page 317:

> "That which constitutes an impairment of the obligation of the contract may also constitute a deprivation of due process. In both property rights may suffer. *Therefore no order can be made by a court in the enforcement of a judgment which would, in violation of due process, take from the litigant substantive property rights* —rights which may likewise be secured for him from legislative interference by the impairment of obligations clause of the Constitution." (Italics ours.)

If a State Legislature would attempt to pass a law abrogating a contract and failing to restore the persons to the contract to *status quo*, it is submitted that same would be unconstitutional as an impairment of the obligations of a contract. It is therefore argued

that the 14th Amendment likewise bars a State Court from rescinding a contract when it fails to restore persons to their original positions or to adequately recompense them for the amounts expended in a maximum effort to comply with the conditions of the contract.

In view of the foregoing, to allow the Florida Courts to promulgate a judicial policy which would in effect permit the contracts in question to be judicially annulled without compensating the Petitioners herein for the vast sums expended by them would not only be unconscionable but a denial of due process of law.

Conclusion

For the foregoing conclusions it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM G. WALL,
Attorney for Petitioners.

APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

IN CHANCERY.

TITO A. FERRI,
Plaintiff

Vs.

INTERNATIONAL ALUMINUM WINDOW CORPORATION, A Florida Corporation, AERO-VENT ALUMINUM WINDOW CORPORATION, and CHARLES I. GIRSCHOWITCH,
Defendants

No. 145740-F

NOTICE OF FILING SPECIAL MASTER'S REFORT

To: E. F. P. BRIGHAM, ESQ.
221 Shoreland Building
Miami, Florida
Attorney for Plaintiff

GIBSON & GIBSON
PASCHAL C. REESE
209 South Olive Avenue
West Palm Beach, Florida
Attorneys for Defendants

You are hereby notified that the undersigned has this 28th day of January, 1953, filed his Special Master's Report in the above-styled cause.

.....

ROGER EDWARD DAVIS
Special Master in Chancery
230 Shoreland Building
Miami, Florida.

Appendix A.

I HEREBY CERTIFY that I have served a copy of the above Report on E. F. P. Brigham, Attorney for Plaintiff, and Gibson & Gibson, and Paschal C. Reese, Attorneys for the Defendants, this 28th day of January, 1953.

.....
SPECIAL MASTER

THIS CAUSE having been referred to the undersigned as Special Master by the Honorable William A. Herin, Circuit Judge, on the 27th day of February, A. D. 1952, I did cause the parties hereto to produce their witnesses and proof before the undersigned at 221 Shoreland Building, on June 23, 1952, a copy of the transcript of testimony and exhibits offered in evidence, being attached hereto.

From the pleadings, testimony and proof, I beg to make the following report together with my findings of fact, conclusions of law and recommendations.

JURISDICTION

This is a suit for a declaratory decree, seeking the rescission and cancellation of certain contracts entered into between the parties hereto.

Personal service of process was had upon the International Aluminum Window Corporation and constructive service of process upon the defendants Aero-Vent Aluminum Window Corporation and Charles I. Girschowitch, and all defendants have filed their answer herein.

Appendix A.

PLEADINGS

The Bill of complaint filed on December 10, 1951 alleges in substance that the plaintiff is the inventor of an improvement of a louvre-type window known as Patent # 2,551,590; that on May 18th, 1946 the defendant, Charles I. Girschowitch, induced the plaintiff to enter into a contract whereby Girschowitch would receive one-half in said patent in return for producing the capital required to place the invention in production.

That thereafter on June 25, 1946, the defendant Girschowitch persuaded plaintiff to join with him in giving to the International Aluminum Window Corporation, which had been organized by Girschowitch, the sole right to manufacture and sell the invention and "any further invention he may discover, in respect to the said window structures whether such improvements or further invention shall be patented or not", in return for which plaintiff and defendant Girschowitch each received 255 shares of stock of the defendant, International Aluminum Window Corporation.

On June 17, 1949 the defendant Girschowitch induced plaintiff to enter into a contract whereby the International Aluminum Window Corporation gave to the defendant, Aero-Vent Aluminum Window Corporation, the rights to the manufacture and sale of the invention everywhere outside the State of Florida.

The defendant Girschowitch organized and controlled both the International Aluminum Window Corporation and the Aero-Vent Aluminum Window Corporation; that neither of the said defendants has placed the invention in production and that the entire

consideration by which plaintiff was induced to part with said invention has failed and that the plaintiff was induced to enter into said contracts by untrue representations on the part of Girschowitch.

The Answer of the defendants admits the invention by plaintiff and the execution of the various agreements but deny misrepresentations and allege that the failure to put the patent into production is the fault of plaintiff.

FINDINGS OF FACTS

The evidence and proof substantiated the material allegations of the pleadings as to the invention, the agreements between Ferri and Girschowitch, and with the defendants, International Aluminum Window Corporation and Aero-Vent Aluminum Window Corporation, leaving two questions of law to be settled,

(a) Did the conduct of Girschowitch and the corporations which he controlled constitute overreaching or constructive fraud.

(b) Did the consideration for the agreements fail.

The proof, stripped of innuendos, accusations, irrelevancies and ramifications having little bearing on the real issues involved, presents the familiar picture of a man, the plaintiff Ferri, who, possessed of an exceptional inventive mind but lacking the necessary balance, commonly known as business sagacity, and the finances, required to cause the bid of his idea to bloom into production, forced to sacrifice a portion of his invention to someone promising the attributes which he lacked.

Ferri had the germ of an invention of an improve-

ment to an Aluminum louvre-type window. He entered into an agreement with Girschowitch wherein he gave Girschowitch one-half interest in the invention in return for Girschowitch's promise to finance its production. No production was begun under the agreement.

Girschowitch then organized International Aluminum Window Corporation, of which he was President, and persuaded Ferri to join with him in granting unto the corporation the exclusive license to manufacture and sell the invention, in return for which Ferri and Girschowitch each received 255 shares of corporate stock. The corporation under the agreement was also to receive from plaintiff "any further invention he may discover, in respect to the said window structures, whether such improvements or further inventions shall be patented or not". No production developed under this agreement.

Girschowitch then organized Aero-Vent Aluminum Window Corporation, of which he was President, and persuaded Ferri to agree with him to have International Aluminum Window Corporation give to Aero-Vent Aluminum Window Corporation world rights to manufacture and sell the invention, outside of the State of Florida, upon a royalty basis. No production developed under this agreement.

Under the first agreement Ferri gave Girschowitch one-half interest in the patent, upon the promise of Girschowitch to produce capital to manufacture.

The second agreement merely changed the status of Ferri and Girschowitch from that of partners or joint adventurers, owning the invention together, to that of equal stockholders in International Aluminum Window Corporation, whose sole asset, apparently,

was the licensing agreement to manufacture and sell the invention of Ferri and the contingent interest in improvements or inventions in respect to window structure. While Ferri and Girschowitch still owned title to the invention, only the International Aluminum Window Corporation could manufacture and sell same, and their only opportunity to profit was from ownership of the stock. Thus, in effect, Ferri lost all right to the invention to the corporation.

The agreement of the Corporation to manufacture and sell the invention constituted sufficient consideration to support the contract. However, when the Corporation failed to perform, the consideration necessarily failed and the contract became subject to rescission. It is not necessary to impute fraud to any party to the transaction. It may well be that Girschowitch through the corporations had every intention to perform his part of the original agreement. Nevertheless, the Corporation failed to get into production within a reasonable time. The reason is of little concern. Performance is an essential part of the contract. The failure cannot be laid at the doorstep of Ferri. Had he been able to manufacture the invention himself, he would have no reason to give Girschowitch or the Corporation an interest in his invention. He relied upon Girschowitch and the Corporations to get the invention manufactured and sold. This they failed to do and there is no concrete evidence of maximum effort to do so, nor does there appear the likelihood that they could perform on the contract in the near future.

The defendants attribute the failure to produce to government restrictions on materials and machinery, and the failure of Ferri to cooperate.

However, the testimony fails to show substantial effort on the part of defendants to obtain necessary machinery or materials. Testimony was adduced designed to show failure on the part of Ferri to furnish drawings promptly. The agreement did not require Ferri to furnish such drawings. Nevertheless, as long ago as January, 1948 Ferri did furnish perfected drawings for the making of dies but production was still not forthcoming.

Prior to the agreement with the Aero-Vent Aluminum Window Corporation, Girschowitch on September 22, 1947 wired Ferri:—

> "CAN ARRANGE FOR IMMEDIATE PRODUCTION FULLY EQUIPPED PLANT UP TO FIVE HUNDRED WINDOWS DAILY. IN ORDER TO ACCOMPLISH THIS IT IS NECESSARY TO GIVE THE SELLING RIGHTS TO A SALES CORPORATION WHO WILL GUARANTEE US ONE DOLLAR ROYALTY PER WINDOW. I THINK THIS IS ADVISABLE. PLEASE ANSWER BY WIRE IMMEDIATELY."

On April 7, 1948 Girschowitch wrote Ferri in part as follows:—

> "As I have previously advised you, I have made arrangements with various companies for the production of at least 1,000 windows per day by each of them. The names of those companies are Industrial Machine Tool Co., Fenton, Michigan; General Engineering and Drydock Corp., San Francisco, Calif.; and Daunt Corporation, for the New York area. The dies and metals for the sample windows are now on the way and the sample windows are now in process of preparation."

Appendix A.

This wire and letter were inducements to Ferri to consent to the sales agreement with Aero-Vent Aluminum Window Corporation subsequently entered into wherein International Aluminum Window Corporation would receive $1.00 per window royalty.

Neither the 500 per day or 1000 per day promise materialized. It is reasonable to suppose that these promises to produce in large quantities influenced Ferri to agree to the royalty sales contract. Why this production was not accomplished after the Aero-Vent Aluminum Window Corporation contract was approved is not satisfactorily explained.

Ferri was undoubtedly impressed with the apparent wealth, affluence and business connections of Girschowitch and was influenced by these impressions to give Girschowitch and the Corporations which he controlled interest in the patent.

The sole reason Ferri could have had in giving Girschowitch one-half interest in his invention, was to obtain production. This Girschowitch was obligated to do—this he failed to do. The cause of the failure is of little importance. The inescapable fact remains that plaintiff was the inventor and Girschowitch's sole equitable claim would be based upon his ability to make the invention profitable to the inventor. This was the consideration for the agreement. When Girschowitch and his Corporations after six years failed to get the invention into production, the consideration failed.

CONCLUSION

I conclude therefore as follows:—

(1) That the consideration for the agreement of

May 18, 1946 between Ferri and Girschowitch has failed.

(2) That the consideration for the agreement with International Aluminum Window Corporation dated June 26, 1946 has failed.

(3) That the consideration for the agreement with Aero-Vent Aluminum Window Corporation dated June 17, 1949 has failed.

WHEREFORE, I RECOMMEND,

(1) That the agreement dated May 18, 1946 between Girschowitch and Ferri be declared null and void.

(2) That the agreement dated June 26, 1946 between Girschowitch and Ferri and International Aluminum Window Corporation be declared null and void.

(3) That the agreement dated June 17, 1949 between Girschowitch and Ferri, International Aluminum Window Corporation and Aero-Vent Aluminum Window Corporation be declared null and void.

(4) That Ferri be declared the sole and exclusive owner of the patent No. 2,551,590.

SERVICES OF THE SPECIAL MASTER

Hearings were held by me on three (3) days during which 231 pages of testimony were taken and 31 exhibits were introduced. Novel problems were involved in the case requiring careful study and analysis of the testimony and exhibits and of decisions pertaining to the law involved. In accordance with local rule 10-D, I respectfully suggest that a reasonable fee for my services herein would be a minimum of $750.00

and a maximum of $1,000.00, the cost of which should be borne equally by the parties hereto.

Respectfully submitted

.....

SPECIAL MASTER.

APPENDIX B

(On March 13, 1953 Final Decree was entered and filed, and recorded on March 16, 1953 in Chancery Order Book 1071 on Page 186 in the words and figures following, to-wit:)

CIRCUIT COURT, COUNTY OF DADE, FLORIDA

(CAPTION OMITTED)

FINAL DECREE

This cause having come on for final hearing upon the report of the Special Master heretofore filed in this cause by the Special Master, Roger Edward Davis, on the 28th day of January, 1953, and the exceptions of the Defendants to said Master's report, filed on February 4th, 1953, and upon the motion of the Plaintiff for final decree, in accordance with said Special Master's report; and notice having been given of this final hearing, and the exceptions to said Master's report having been presented to and argued before this Court by counsel for the respective parties,

and the Court now being advised in the premises, upon consideration thereof; it is

CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

1. That the equities of this cause are with the Plaintiff, Tito A. Ferri, and that he is entitled to the relief prayed for in his complaint.

2. That the Court has jurisdiction of the parties and the subject-matter of this cause.

3. That the report of Roger Edward Davis, as Special Master of this Court, which was filed in this cause on January 28th, 1953, be and the same is hereby approved and confirmed in all respects.

4. That the agreement dated May 18th, 1946, by and between the Plaintiff, Tito A. Ferri, and the Defendant, Charles I. Girschowitch, which was admitted in evidence as Plaintiff's Exhibit "A", a true copy of which is attached to the Plaintiff's complaint as Exhibit "A", be and the same is hereby declared to be null and void and of no effect.

5. That the agreement dated June 26th, 1946, between the Defendant, Charles I. Girschowitch, and the Plaintiff, Tito A. Ferri, and the defendant, International Aluminum Window Corporation, which was introduced in evidence as Plaintiff's Exhibit "B", a true copy of which is attached to the Plaintiff's complaint as Exhibit "B", be and the same is hereby declared null and void and of no effect.

6. That the agreement dated June 17th, 1949, between the Defendant, Charles I. Girschowitch, and

the Plaintiff, Tito A. Ferri, and the Defendant, International Aluminum Window Corporation, and the Defendant, Aero-Vent Aluminum Window Corporation, which was introduced in evidence as Plaintiff's Exhibit "C", be and the same is hereby declared to be null and void and of no effect.

7. That the Plaintiff, Tito A. Ferri, be declared the sole and exclusive owner of that certain patent for a new and useful improvement in "WINDOW STRUCTURE", which was issued by the United States Patent Office at Washington, D. C., on May 8th, 1951, by the Honorable John A. Marzall, Commissioner of Patents, and bearing No. 2551590, said patent being issued in the names of Tito A. Ferri, of Miami, Florida, and Charles I. Girschowitch, and the original of said patent being introduced in evidence in this cause as Defendant's Exhibit # 9.

8. That the Special Master herein be and he is hereby allowed a fee of $750.00.

9. That the costs of this proceeding, including the Master's fee herein taxed in the sum of $940.73 be paid equally by the Plaintiff, Tito A. Ferri, and the Defendants, International Aluminum Window Corporation, a Florida corporation; Aero-Vent Aluminum Window Corporation, a New York corporation; and Charles I. Girschowitch.

DONE AND ORDERED at Miami, Dade County, Florida, this 13 day of March, 1953.

WILLIAM A. HERIN
CIRCUIT JUDGE

APPENDIX C

(Reported in Southern Report Advance Sheets for May, 1954)

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1954

SPECIAL DIVISION B.

International Aluminum Window Corporation, a Florida corporation; Aero-Vent Aluminum Window Corporation, a New York corporation; and Charles I. Girschowitch, Appellants, vs. Tito A. Ferri, Appellee.	Case No. 24,798

Opinion filed April 13, 1954

An Appeal from the Circuit Court for Dade County, William A. Herin, Judge.

Paschal C. Reese, for Appellants

E. F. P. Brigham and George Eadie Orr, for Appellee

Taylor, *Associate Justice*:

The plaintiff below, Appellee here, Tito A. Ferri, had invented a new type of window, and, naturally, wanted to profit from this invention by the manufacture and sale of these windows.

Appendix C.

On May 18, 1946, Ferri entered into a contract with the defendant below, Charles I. Girschowitch, which recited that Girschowitch "desires to undertake to develop the said product, organize a program for its development, manufacture and distribution, and to finance the same." The contract, among other things, provides that Girschowitch "agrees that, if his patent counsel decides that the new improvements and designs are patentable and will be free from infringement of (a patent not here involved) he will obtain the necessary financing for the enterprise and that he will advance the money in such amounts as and when needed." This contract indicated the intention of the parties to form a corporation and the sale of some stock to third parties but the maintenance of the control of the corporation by Ferri and Girschowitch.

Construing this contract as a whole and in the light of the evidence, it is apparent that the intention of the parties was that Ferri should contribute his invention and Girschowitch would furnish the necessary capital and business ability to put the windows into production and on the market.

In the contract Ferri agreed to assign to Girschowitch a one-half interest in any patent secured on the invention.

The patent was promptly applied for, but was not actually issued until several years later.

Promptly after the making of this contract, Girschowitch caused the incorporation of International Aluminum Window Corporation, of which he was president and which he proceeded to dominate. Ferri and Girschowitch on June 26, 1946, in consideration for 255 shares of its stock issued to each of them, granted

to International Aluminum Window Corporation a license to manufacture windows in accordance with Ferri's invention and the patent application which was then pending.

On June 17, 1949, International Aluminum Window Corporation granted a sub-license to Aero-Vent Aluminum Window Corporation, a purported New York Corporation. We say "purported" corporation because, from the evidence, it is doubtful if the incorporation of this company was ever perfected. If it was a legal entity, it clearly was an alter ego of Girschowitch.

From 1946 to the institution of this suit in December, 1951, the invention of Ferri has never been developed to the extent of the sale of a single window, and the only window ever constructed and assembled was one made by Ferri.

This suit was brought by Ferri to cancel the three contracts above mentioned for failure of consideration, and to secure a decree declaring that he, Ferri, was the sole owner of the patent which was issued in the names of Ferri and Girschowitch. The Circuit Court granted the relief prayed, and Girschowitch and the two corporations have appealed.

The consideration that Ferri was to receive for the interest in his invention that he transferred to Girschowitch was the commercial production of windows in accordance with Ferri's invention. This is what Girschowitch undertook to accomplish. This he failed wholly and completely to do. He neither developed, manufactured, or distributed a single window over a period of more than five years.

The evidence makes it clear that from the beginning the intention of Girschowitch was to act as pro-

moter rather than manufacturer or financier. He made some substantial effort to get others to manufacture and produce the windows, but he failed to get results. Results were what he contracted to produce.

In order to excuse this failure, Girschowitch offered two claims. First, he says that Ferri failed to furnish necessary drawings and technical data to facilitate the manufacture of the windows. The evidence shows that Ferri did all that was required of him under the contract. Second, he says that materials necessary for the manufacture of the windows could not be obtained due to Government restrictions and war shortages. The evidence fails to substantiate this contention.

As a third reason why complete rescission should not be granted, Girschowitch asserts that he has expended substantial funds in efforts to place the windows in production and that rescission should not be awarded Ferri without requiring Ferri to place him in status quo by reimbursing him for these expenditures. The answer to this argument is that what Girschowitch agreed to furnish was production of the windows in commercial quantities. He failed to do this. His efforts were directed toward trying to get others to produce, on a royalty basis, the windows that he was obligated to develop, manufacture, and distribute. Had he succeeded, and had the project proved profitable, he would have reaped substantial profits from a minimum of money and effort. He failed, and in failing he likewise failed to perform in any degree his obligations to Ferri.

Ordinarily, the breach of an executory promise or

agreement is not regarded as a proper basis for the rescission or cancellation of a contract. But "where the injury caused by the breach of the contract is irreparable, or the damages that might be awarded would be inadequate, or difficult or impossible to determine, the injured party may resort to equity for rescission". 9 Am. Jur. page 374, See *Briggs* v. *Robinson* (Colo.) 256 Pac. 639, 52 A. L. R. 1172.

The position of International Aluminum Window Corporation is no better than that of Girschowitch. As a licensee of the patent, it was merely the tool by which the contract between Ferri and Girschowitch was to be performed. The only consideration moving to Ferri for his license to International was stock in International. All the parties knew that only by the production and sale of windows under the Ferri invention could this stock be of any value. The failure of the corporation, under these circumstances, to manufacture even a single window for a period of five years demonstrates a failure of consideration justifying rescission. The evidence also furnishes ample basis for a cencellation of the license of International Aluminum Window Corporation because of abandonment. In C. J. S., Vol. 69, Page 791, the rule is stated: "Non-user may show sufficient abandonment to permit the license to be treated as forfeited, and may entitle the licensor to a rescission of the license".

It would be difficult to find a factual situation more appealing to a Court of Equity for the application of this rule than that presented by the record before us.

An inventor of foreign birth and limited education, without experience in business affairs, entrusts the

product of his brain to one who represents himself as being both able and desirous of placing the invention into production for their mutual benefit, licenses his invention to a corporation ostensibly organized for this purpose, receiving only a certificate of stock in the corporation which had no other assets. The corporation does nothing substantial toward manufacturing the articles invented for a period of more than five years, and indicates no ability or serious intention to manufacture them in the near future. It would be a reproach to our judicial system if, under such circumstances, relief could not be granted.

The decree of the Circuit Court is affirmed.

ROBERTS, *C. J.*, DREW and BUFORD, *JJ.*, CONCUR.